Supreme Court, U.S.
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No. 97-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,
Petitioner,

v.

VALERIE LYNN GREAR AND PAUL C. NORDBERG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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This brief is being filed pursuant to S. Ct. R. 15.8, in order to call the Court's attention to "intervening matter[s] not available at the time of [petitioner's] last filing." *Id.* The petition in this case continues to raise an important procedural issue that directly affects every circuit court and district court nationwide: namely, whether a court of appeals lacks jurisdiction to entertain *either* an interlocutory appeal *or* a petition for writ of mandamus challenging a trial court order compelling the disclosure of privileged communications. The purpose of this supplemental brief is to explain that further developments in the underlying case do not impede the Court from addressing and resolving this issue, which warrants plenary review here.

General Motors filed the petition for *certiorari* in this case on October 31, 1997. On November 1, 1997, General Motors filed a stay application with Justice Stevens, and a response was filed on November 12, 1997. The response did not dispute that the petition and stay application in this case have identified a clear and irreconcilable three-way conflict among the courts of appeals on an important procedural issue, but pointed out that the underlying case was already set to go to trial on December 15, 1997, and noted that the grant of a stay would interfere with the trial date. Justice Stevens referred the stay application to the full Court, and it was denied on November 19, 1997.

Every other circuit court to have addressed the issue has concluded that parties may avail themselves of either interlocutory appeal or mandamus as a mechanism to challenge a trial court's compelled disclosure of documents or other communications protected by the attorney-client privilege and work-product doctrine; in a recent decision, the Third Circuit held that parties may avail themselves of both mechanisms. *See In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997); *see also* Pet. 8-12. The Sixth Circuit alone has required litigants to disobey orders compelling disclosure of privileged documents and go into contempt before seeking appellate review, *see* Pet. App. 14a-17a, which General Motors believes would all but eliminate judicial protection of "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

After the Court denied General Motors' application for stay to block compulsory disclosure of the privileged documents at issue in this case, General Motors faced the same unpalatable choice that it had described in the petition: either violate the trial court's order and go into contempt, with no clear prospect of any basis for appellate review to protect its rights, or disclose the privileged documents at issue in this case. *See* Pet. 12-17. General Motors chose the latter alternative, as counsel informed the Court by letter dated November 26, 1997. *See* Appendix A (attached). In that letter, counsel stated that General Motors would address the significance of these developments in its reply brief on the petition for certiorari. *Id.*

Respondents thereafter submitted a letter dated November 25, 1997, waiving any response to the petition unless the Court directed them to file one. *See* Appendix B (attached).

Two further points merit attention here. *First*, General Motors' disclosure of the privileged documents at issue in the underlying case, subject to the terms of a protective order that has been imposed by the trial court, does not moot the procedural issue that is cleanly presented here. The same significant issues that General Motors has raised about the scope of the attorney-client privilege remain with respect to the admissibility and use of these documents at trial. Therefore, the restricted and confidential disclosure of these documents in discovery does not implicate the broader concerns that would surround the use and discussion of these documents at trial in open court. Nevertheless, the Sixth Circuit's rulings continue to bar General Motors from obtaining any meaningful review of the classification and handling of these privileged documents in advance of the trial in this case, and thus to undermine the strong protection that courts have traditionally afforded to the attorney-client privilege. And as to the compelled pre-trial disclosure of General Motors' privileged documents, the restrictive nature of the Sixth Circuit's rulings guarantees that this issue is one "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-15 (1911).

Second, the trial court recently postponed the trial date in the underlying case. As announced at a recent scheduling conference, the trial is not slated to commence until July 21, 1998. This new development has eliminated any concern that the Court may have had, when it ruled on the stay application, that granting plenary review here would interfere with an imminent trial date.

The procedural issues raised in the petition are important to the consistent administration of justice in the federal courts. Plenary review is warranted to clarify the proper procedures that are to be followed by litigants and the lower federal courts in ensuring appropriate protection for the attorney-client

privilege. Those questions remain directly at issue in this case, and they warrant review and resolution on *certiorari* at this time. The Court should, at a minimum, call for a response to General Motors' petition.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Attorneys for Petitioner

December 18, 1997

ATTACHMENTS

ATTACHMENT A

November 25, 1997

VIA FEDERAL EXPRESS

Honorable William Suter
Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: General Motors Corporation, Petitioner
v. Valorie Lynn Grear, et al., Respondents
A-33 (97-746)

Dear General Suter:

I am enclosing a waiver form indicating that we do not intend to file a response to the Petition for Writ of Certiorari filed by General Motors Corporation unlesss [sic] one is requested by the Court.

Sincerely,

BURCH, PORTER & JOHNSON, PLLC

W.J. Michael Cody

WJMC/sjl
Enclosure

cc: Counsel of Record/Attorneys for Petitioner
per Attached List (w/encl.)

ATTACHMENT B

November 26, 1997

VIA HAND DELIVERY

General William K. Suter
Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *General Motors Corporation v. Valorie Lynn Grear and Paul C. Nordberg*, Docket No. 97-746

Dear General Suter:

This letter is to inform the Court of a further development in the above case. General Motors, lacking a stay of the district court's discovery order and under pain of contempt, has disclosed the Task Force documents at issue subject to a protective order. General Motors will address the significance of this development in its reply brief in support of its petition for writ of certiorari.

Yours sincerely,

Paul T. Cappuccio